Supreme Court, U.S.
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96 866 NOV 27 1996. (1)

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No. _____

In The

Supreme Court of the United States

October Term, 1996

ANTONIO GREY; MARTAIN THOMPKINS,

Petitioners,

vs.

KEITH MORRIS; ED KETZLER; MARK TEMNYK; and PAT MITCHELL,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

FRANK G. BECKER
FRANK G. BECKER & ASSOCIATES, P.C.
Counsel for Petitioner
18501 West Ten Mile Road
Southfield, Michigan 48075
313/569-4910

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

39 pp

QUESTION PRESENTED FOR REVIEW

WHETHER STATE IMMUNITY LAW CAN BAR THIS *42 U.S.C. SEC. 1983* ACTION?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE..... 2

REASONS FOR GRANTING THE WRIT 4

BASED ON THE NATURE AND BASIS FOR THE STATE COURT'S DISMISSAL OF THE PETITIONERS' STATE COURT LAWSUIT, THE PETITIONERS WERE ENTITLED TO LITIGATE THEIR FEDERAL CONSTITUTIONAL CLAIM BROUGHT PURSUANT TO *U.S.C. SEC. 1983*..... 4

CONCLUSION 17

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 66 L.Ed.2d 308 (1980) 14

Basita v. Weir, 340 F.2d 74 (4th Cir. 1965) 14

Berkaw v. Mayflower Congregational Church, 378 Mich. 239 (1966) 10

Birnbaum v. Trussell, 371 F.2d 672 (2nd Cir. 1966) 14

Bresnahan v. Nugent, 92 Mich. 76 (1892) 9

County of San Joaquinn v. Dewey, 105 Mich. App. 122, 306 N.W.2d 418 (1981) 11

District of Columbia v. Carter, 409 U.S. 418, 93 S. Ct. 602, 34 L.Ed.2d 613 (1973), *rehearing denied*, 410 U.S. 959, 93 S. Ct. 1411, 35 L.Ed.2d 694 (1973) 13

Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991) 16

Duncan v. Peck, 752 F.2d 1135 (6th Cir. 1985) 16

Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302, 101 L.Ed.2d 123 (1988) 12

Green v. Duke, 480 F.2d 624 (9th Cir. 1973) 13

Haring v. Prosise, 462 U.S. 306, 103 S. Ct. 2368, 76 L.Ed.2d 494 (1983) 15

Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 3430, 110 L.Ed.2d 332 (1990) 12

Laude v. Cossins, 334 Mich. 622 (1952) 10

TABLE OF AUTHORITIES – Continued

Page

Lombard v. Board of Education of the City of New York, 502 F.2d 631 (2nd Cir. 1974), *cert. denied*, 420 U.S. 976 (1975) 16

Martinez v. California, 444 U.S. 277, 100 S. Ct. 553, 62 L.Ed.2d 481 (1980) 12

Migra v. Warren School District Board of Education, 465 U.S. 75, 104 S. Ct. 892, 79 L.Ed.2d 56 (1984) 5

Monroe v. Pape, 365 U.S. 167 (1961) 12

Oakley v. Michigan Department of Mental Health, 122 Mich. App. 638, 332 N.W.2d 552 (1983) 10

Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L.Ed.2d 673 (1980) 12

Palchi v. Robbins, 272 Mich. 441 (1935) 9

Roberts v. City of Troy, 170 Mich. App. 567, 429 N.W.2d 206 (1988) 6

Rodman v. Michigan Central Railroad Company, 49 Mich. 395 (1886) 7, 8

Storey v. Meijer, Inc., 431 Mich. 368, 429 N.W.2d 169 (1988) 7

Taylor v. Auditor General, 360 Mich. 146 (1960) 10

Wade v. City of Pittsburgh, 765 F.2d 405 (3d Cir. 1985) 4, 5

Wessborg v. Merrill, 195 Mich. 556 (1917) 10

Xerox Corporation v. Kalamazoo, 76 Mich. App. 150, 255 N.W.2d 797 (1977) 10

STATUTE

42 U.S.C. Sec. 1983 4

PETITION FOR WRIT OF CERTIORARI

Antonio Grey and Martain Thompkins respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 29, 1996 in order to redress the clear error of the lower courts.

OPINIONS BELOW

The relevant opinion and orders are reproduced in the Appendix beginning at p. 1a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)

This petition is filed within 90 days of the Court of Appeals' Opinion Affirming the District Court dated August 29, 1996

STATUTE INVOLVED

This case involves 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of

> any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Antonio Grey and Martain Thompkins, the Plaintiffs-Appellants, originally filed a state court action in the Wayne County Circuit Court of the State of Michigan in which they alleged that their rights under the Michigan Constitution (Mich. Const. Article I, Sec. 1, 2, 16, 17) and their rights under two (2) Michigan Public Accommodations statutes (MSA Sec. 28.343; MSA Sec. 3.548) were violated as a result of a claimed unreasonable search and seizure of their persons. In essence, the Plaintiffs claimed that they were arrested without probable cause and that in the course of their arrest excessive force was used against them. Both Plaintiffs claimed significant injuries in the original state court litigation. The Plaintiffs were students of Wayne State University and the Defendants were Wayne State University Public Safety Officers.

The State Court Judge, Kathleen MacDonald, delivered an oral opinion on June 15, 1994 in which she ruled, following arguments of the parties, that probable cause for the arrests of the Plaintiffs existed and that all the individual Wayne State University Police Officers were entitled to immunity under state law MCLA 691.1401 *et*

seq. (Tr. of Defendants' Motion for Summary Disposition 6/15/94, pp. 20-27). Despite the questioning by Plaintiffs' counsel in the state court action (id. p. 25), the state court judge made no ruling or specific finding with regard to any excessive force claim although all the Plaintiffs' claims were dismissed. The State Court Judge specifically found that all the Defendant Officers were immune:

> As far as the governmental immunity claim, I think all of these officers are immune.
>
> (id. p. 26)

No appeal was taken by the Plaintiffs from this adverse ruling. Instead, on October 3, 1994, the Plaintiffs filed the instant action in the Federal District Court for the Eastern District of Michigan alleging violation of their First and Fourth Amendment rights to be free from unreasonable search and seizure. Specifically, the Plaintiffs claimed that they were falsely arrested and excessive force was used against them. (R. 1) The Federal District Court, The Honorable Patrick J. Duggan, issued an Opinion and Order Granting Defendants' Motion for Summary Judgment on April 20, 1995. (R. 16) Later, on July 5, 1995, The Honorable Patrick J. Duggan, issued an Opinion and Order Denying Plaintiffs' Motion for Reconsideration. (R. 20) The basis for the District Court's rulings was the doctrine of *res judicata.* The lower court reasoned that since the state court had dismissed the Plaintiffs state law claims that the Plaintiffs were precluded from filing a subsequent *42 U.S.C. Sec. 1983* cause of action. The Sixth Circuit Court of Appeals upheld this Order in an unpublished Opinion dated August 28, 1996.

REASONS FOR GRANTING THE WRIT

BASED ON THE NATURE AND BASIS FOR THE STATE COURT'S DISMISSAL OF THE PETITIONERS' STATE COURT LAWSUIT, THE PETITIONERS WERE ENTITLED TO LITIGATE THEIR FEDERAL CONSTITUTIONAL CLAIM BROUGHT PURSUANT TO *U.S.C. SEC. 1983.*

The state court record and the nature of Petitioners' litigation clearly shows that the Petitioners were entitled to seek redress of their federal constitutional rights in federal court through the instant *42 U.S.C. Sec. 1983* action.

In essence, the lower courts have ruled that the state judge, through application of state governmental immunity, could permanently deprive the Plaintiffs of the opportunity to bring the federal constitutional claims in federal court. Consequently, the lower court has taken the position that state governmental immunity law supersedes not only federal law but the federal Constitution. Of course, such a result is totally untenable.

The decision which most closely approximates the instant situation is *Wade v. City of Pittsburgh,* 765 F.2d 405 (3d Cir. 1985). In *Wade,* although a state court judge had granted summary judgment to the Defendant on the basis of state statutory immunity, the Third Circuit held, in reversing the district court, that invocation of the state immunity laws did not preclude a subsequent *42 U.S.C. Sec. 1983* case. In so doing, the Third Circuit emphasized the necessary supremacy of federal law in this context:

> This governmental immunity statute, although effective against a state tort claim, has no force when applied to suits under the Civil

> Rights Acts. The supremacy clause of the Constitution prevents a state from immunizing entities or individuals alleged to have violated federal law. This result follows whether the suit to redress federal rights is brought in state or federal court. *Martinez v. California*, 444 U.S. 277, 284, 100 S. Ct. 553, 558, 62 L.Ed.2d 481 (1980); *Mancini v. Lester*, 630 F.2d 990, 994 (3d Cir. 1980); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968). Were the rule otherwise, a state legislature would be able to frustrate the objectives of a federal statute. Had plaintiff joined a count under Sec. 1983 in the first suit, it is clear that the state court could not have used the immunity statute to enter judgment for the city on the federal claims. *See Morris v. Musser*, 84 Pa.Commw. 170, 478 A.2d 937 (1984).
>
> (765 F.2d at 407-408)

As also recognized in *Wade*, pursuant to the United States Supreme Court decision in *Migra v. Warren School District Board of Education*, 465 U.S. 75, 104 S. Ct. 892, 79 L.Ed.2d 56 (1984) one must look toward the relevant state law to determine what, if any, claims are precluded. *MCR 2.203* provides with regard to the issue of compulsory joinder of claims that the "failure to object in a pleading, by motion, or at a pretrial conference to improper joinder of claims or **failure to join claims required to be joined constitutes a waiver of the joinder rules and the judgment shall only merge the claims actually litigated.** *MCR 2.203(A)(2)* A review of the Defendants' answer to the Plaintiffs' state court complaint reveals no objection by way of pleading or motion with regard to any improper failure to include federal constitutional claims. Moreover, the opinion of the state court judge is devoid

of any consideration or even mention of the Plaintiffs' excessive force claims, except as to a blanket assertion of governmental immunity.

A review of applicable Michigan law clearly provides that under the facts and circumstances of this case, *res judicata* would not bar the Plaintiffs' case. Perhaps, the case most clearly on point, because it shows the opposite side of the same coin is *Roberts v. City of Troy*, 170 Mich. App. 567, 429 N.W.2d 206 (1988). In *Roberts*, it was held that despite a federal court action which clearly was on the merits, the Plaintiff would be allowed to bring state law claims against the same Defendant:

> Defendant City of Troy contends that plaintiff's instant cause of action against the city was already adjudicated by the federal court and is barred by res judicata. However, in the federal court case, the only claims against the City of Troy which were adjudicated on the merits were plaintiff's federal civil rights claims and the state law claim based on vicarious liability for the alleged ultra vires conduct of defendant Fisher. In the instant action, plaintiff's claim against the City of Troy is not based on vicarious liability for the ultra vires conduct of defendant Fisher, but is based on the City of Troy's own claimed ultra vires conduct. Since the instant cause of action against Troy was not previously decided on the merits, the doctrine of res judicata does not apply.
>
> (429 N.W.2d at 211)

Michigan also places very strong emphasis on the right to have a full and fair adjudication on the merits. The Michigan Supreme Court, consequently, held in

Storey v. Meijer, Inc., 431 Mich. 368, 429 N.W.2d 169 (1988) that no *res judicata* effect would be given to MESC determinations because the determinations for unemployment compensation were summary in nature and were not intended to be a full and fair determination of the merits. Obviously, the ruling by Judge MacDonald could not be considered to be a full and fair determination of the merits since not all the Plaintiffs' claims (excessive force) were even considered by Judge MacDonald and no testimony was taken and the Plaintiffs' federal civil rights were not even considered.

The application of state governmental immunity to the Plaintiffs' original complaint in state court certainly is devoid of consideration, in other words, governmental immunity applies even when the plaintiff would have an otherwise valid case. **Since governmental immunity may be invoked regardless of the merits, how could such a determination be considered a ruling *on the merits*?**

The state court judge clearly ruled that the Michigan Public Accommodation Statute was not applicable to the Plaintiffs' alleged arrest. Therefore, it is hard to imagine how, if this ruling were correct, an invalid cause of action would bar a subsequent valid (*42 U.S.C. Sec. 1983*) action.

Considerations of due process and fairness would indicate that the Plaintiffs should be entitled to have a decision ***on the merits***. Michigan case law firmly supports the Plaintiffs' position in this regard. The same issue as present in the instant case arose in *Rodman v. Michigan Central Railroad Company*, 49 Mich. 395 (1886). In *Rodman*, the trial judge sustained a general demurrer to the Plaintiff's Complaint. The Plaintiff re-filed his case stating a

new cause of action, which survived the Defendant's Motion for Demurrer. After verdict in favor of the Plaintiff, the contention, as is being done in this case, was made that the first cause of action constituted *res judicata*. Thus, this case presents exactly the same situation as was presented to the Michigan Supreme Court in *Rodman*. The Michigan Supreme Court's reaction to this question could not be any more cogent:

> The Defendant's counsel now claims the issue sought to be tried in this case is *res ad judicata*; that the judgment in the first case is still in force upon the merits, upon the same cause of action, and between the same parties; that the judgment was final and conclusive between the parties.
>
> I am not prepared to accept this doctrine. How it can be said that the merits of a Plaintiff's case have been passed upon, when the declaration does not state his case, or any merits, I am not able to comprehend. It was twice adjudicated that the declaration in the first case was without merits, that it did not state the Plaintiff's case, or any cause, for the demurrer was held general. How a declaration containing a statement of facts, entitling a Plaintiff to nothing, can be made to defeat a recovery under a declaration containing a statement of facts, entitling the Plaintiff to a judgment for $1,500.00, I confess I have never been quite able to understand. A practice which will allow this to be done can find no support in reason or justice, and can never receive my sanction. This, however, must be done if the bar in this case is to be maintained.
>
> The question of *res ad judicata* seems to have been the principal one raised in this case, and I

> think no error was committed in the ruling upon the subject.
>
> (59 Mich. at 398-399)

If anything, the Plaintiffs' efforts in the first litigation were ineffectual. In essence, the Plaintiffs were told by the state court judge that their claim had no legal existence. In *Bresnahan v. Nugent*, 92 Mich. 76, 84 (1892), the Michigan Supreme Court held in a similar situation as follows:

> An ineffectual attempt to enforce a claim which has no legal existence does not estop a party from thereafter asserting one which is valid.

In *Palchi v. Robbins*, 272 Mich. 441, 418-419 (1935), a complaint was previously dismissed for defects in the form of the complaint, lack of capacity of the parties and lack of jurisdiction of the subject matter. Upon filing a new lawsuit, a claim based on *res judicata* was made. In rejecting this argument, the Michigan Supreme Court relied upon United States Supreme Court precedent:

> The doctrine of "*res judicata* rests upon the principal that a question once determined by a court of competent jurisdiction by a judgment on the merits is forever settled so far as litigants and those in privity with them concerned." *Machen v. Bud Wheel Co.*, 265 Mich. 530, 535.
>
> It is apparent that some of the reasons assigned as ground for dismissal do not present issues affecting the merits of the case. In *Hoffman v. Silverthorn*, 137 Mich. 60, this court held that where reliance was placed upon the fact that a particular question was passed upon in a decision, the burden of proving it was cast upon the one so claiming.

In *Bissell v. Spring Valley Township*, 124 U.S. 225, 232 (8 Sup.Ct. 485) the court said:

> There are undoubtedly many cases where a final judgment upon a demurrer will not conclude as to a future action. The demurrer may go to the form of the action, to a defect of pleading, or to the jurisdiction of the court. In all such instances the judgment thereon will not preclude future litigation on the merits of the controversy in a court of competent jurisdiction upon proper pleadings. And it has been held that where a demurrer goes both to defects of form and also to the merits, a judgment thereon, not designating between the two grounds, will be presumed to rest on the former.

Other cases which support the Plaintiffs' contention that a determination on the merits was not made and, therefore, there is no bar to this action include *Berkaw v. Mayflower Congregational Church*, 378 Mich. 239 (1966); *Taylor v. Auditor General*, 360 Mich. 146 (1960); *Laude v. Cossins*, 334 Mich. 622 (1952); *Wessborg v. Merrill*, 195 Mich. 556 (1917); *Xerox Corporation v. Kalamazoo*, 76 M.A. 150, 255 N.W.2d 797 (1977).

Another decision which merits careful consideration is *Oakley v. Michigan Department of Mental Health*, 122 Mich. App. 638, 332 N.W.2d 552, 554 (1983), in which the Court held as follows:

> Defendant's contention that Plaintiff's unsuccessful Court of Claims acts as a bar to the instant action is incorrect. In that case, the Court of Claims granted Defendant's motion for accelerated judgment on the basis that Plaintiff had

> not exhausted her contract remedies. The doctrine of *res judicata* is inapplicable to actions that are terminated by granting of accelerated judgments because an accelerated judgment motion does not test the merits of the claim; rather, it interposes a technical defense thereto, regardless of the merits of the case. (footnotes omitted)

Of similar import is the following statement from *County of San Joaquinn v. Dewey*, 105 Mich. App. 122, 306 N.W.2d 418, 422 (1981):

> A motion for accelerated judgment, unlike the motion for summary judgment, under GCR 1963, 117, does not test the merits of a given claim. Rather, the motion for accelerated judgment seeks to avoid the merits of a claim by interposing a defense barring Plaintiff's right to affirmative relief, regardless of whether Plaintiff's complaint established a prima facie case. See generally the comments regarding the scope of GCR 1963, 116 and 117 in *1 Honigman & Hawkins*, Michigan Court Rules Annotated (2d ed.), 1980 Supp. p. 134. Absent a decision on the merits of Plaintiff's 1978 claim, the later petition was not barred under principles of *res judicata*.[1]
>
> Accordingly, we reverse the order of the lower court granting Defendant's motion for accelerated judgment and remand the case for proceeding consistent with the applicable provisions of the URESA.
>
> See also, *Cogan v. Cogan*, 149 Mich. App. 375, 385 N.W.2d 793 (1986); *Kilunna v. Wayne State*

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[1] In 1985 Michigan merged accelerated judgment with summary judgment and referred to it as summary disposition. MCR 2.116.

> *University,* 72 Mich. App. 446, 250 N.W.2d 81 (1976); and *Mair v. Consumers Power,* 419 Mich. 74, 348 N.W.2d 256 (1984).

Thus, it is quite clear that Michigan law does not support the use of *res judicata* in this case.

Of course, the essential purpose of *42 U.S.C. Sec. 1983* would be ill served through application of the *res judicata* doctrine in this case. As the United States Supreme Court explained in *Monroe v. Pape,* 365 U.S. 167, 180 (1961):

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced in claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies.

The position of the lowers courts amounts to nothing more or less than allowing a state court judge, using state immunity law as to state claims, to impose a preemptive strike as to any future federal *42 U.S.C. Sec. 1983* claims, based on the United States Constitution. In effect, therefore, the Appellee gives controlling preclusive effect to state immunity law – over *42 U.S.C. Sec. 1983.* This result is not consistent with solid Supreme Court precedent, including: *Howlett v. Rose,* 496 U.S. 356, 110 S. Ct. 2430, 110 L.Ed.2d 332 (1990); *Felder v. Casey,* 487 U.S. 131, 108 S. Ct. 2302, 101 L.Ed.2d 123 (1988); *Owen v. City of Independence,* 445 U.S. 622, 647, n.30, 100 S. Ct. 1398, 1413, 63 L.Ed.2d 673 (1980); and *Martinez v. California,* 444 U.S. 277, 284, n.8, 100 S. Ct. 553, 558, n.8, 62 L.Ed.2d 481 (1980). The mere fact that the Plaintiffs-Appellants' first

unsuccessfully sought state court relief does not make the Plaintiffs less worthy of federal constitutional protection.

In this case, the Plaintiffs' federally protected constitutional rights were not protected in state court through Plaintiffs' reliance on state law. This is the precise reason for the enactment of the federal civil rights statute. As indicated in *District of Columbia v. Carter*, 409 U.S. 418, 427-428, 93 S. Ct. 602, 607-608, 34 L.Ed.2d 613 (1973), *rehearing denied*, 410 U.S. 959, 93 S. Ct. 1411, 35 L.Ed.2d 694 (1973):

> To the Reconstruction Congress, the need for some forms of federal intervention was clear. It was equally clear, however, that Congress had neither the means nor the authority to exert any direct control, on the day-to-day basis, over the actions of state officials. The solution chosen was to involve the federal judiciary. At the time this Act was adopted, it must be remembered, there existed no general federal-question jurisdiction in the lower federal courts. Rather, 'Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws' . . . With the growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials.

Because of the broad purpose of the civil rights legislation *42 U.S.C. Sec. 1983*, the statute has always been interpreted broadly as comprehensive remedial legislation to rectify federal constitutional and statutory wrongs. See example *Green v. Duke*, 480 F.2d 624 (9th Cir.

1973); *Birnbaum v. Trussell,* 371 F.2d 672 (2nd Cir. 1966); *Basita v. Weir,* 340 F.2d 74 (4th Cir. 1965). Therefore, the instant action is exactly and precisely the type of action that was, and continues to be, contemplated by *42 U.S.C. Sec. 1983.* This action was brought because the state court disregarded the rights of the Plaintiffs to be free from an unlawful arrest and excessive force. It would turn *42 U.S.C. Sec. 1983* on its head to say that because of the state court's failure to enforce the Plaintiffs' State Constitutional Rights, their Federal Constitutional Rights claims would – because of that failure – be barred. How could the Plaintiffs foresee such hostile State Court and later Federal Court reception?

In this case, the state court judge did not acknowledge, let alone respect, the Plaintiffs' Federal Constitutional Rights or those similar rights purportedly protected under the State Constitution. Therefore, there was no full and fair determination on the merits. The leading decision of *Allen v. McCurry,* 449 U.S. 90, 101 S. Ct. 411, 66 L.Ed.2d 308 (1980) held that there must be a full and fair determination of the **federal constitutional issue for there to be preclusion.** The Supreme Court would allow a cause of action in this case since the state courts did not provide a remedy:

> To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrine of preclusion. In reviewing the legislative history of Sec. 1983 in *Monroe v. Pape, supra,* the Court inferred that Congress had intended a federal remedy in three circumstances: whether state substantive

> law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. (365 U.S. at 173-174, 81 S. Ct. at 476-477) In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. *Id.* at 176, 81 S. Ct. at 478. This understanding of Sec. 1983 might well support an exception to *res judicata* and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Such an exception, however, would be essentially the same as the important general limit on rules of preclusion that already exists: Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court. See *supra* at 415. But the Court's view of Sec. 1983 in *Monroe* lends no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous.

In the case of *Haring v. Prosise*, 462 U.S. 306, 103 S. Ct. 2368, 76 L.Ed.2d 494 (1983), the Supreme Court held that the issue of an unconstitutional search, which was not decided in a prior criminal trial, could be raised by a Sec. 1983 Plaintiff. This case is precisely on all fours with the instant case since the question of the Plaintiff's federally

constitutionally protected rights were not litigated in the State court proceedings.

Even closer to the instant situation is the case of *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991). In *Dixon* it was held that an excessive force claim was not precluded by rulings on the question of a reasonable suspicion for a stop. In the instant, the Plaintiffs' excessive force claims were only brought in the Federal court action. The State court action concerned the question of unreasonable search.

In *Duncan v. Peck*, 752 F.2d 1135 (6th Cir. 1985), this Circuit held that a federal civil rights action would not be barred by State court proceedings which did not specifically address the federal questions raised. Obviously, *Duncan* has direct application to the facts and circumstances of this case.

Similarly, the strong public policy in favor of having constitutional rights litigated fully and fairly was central to the decision of *Lombard v. Board of Education of the City of New York*, 502 F.2d 631 (2nd Cir. 1974), *cert. denied*, 420 U.S. 976 (1975). This was so despite prior state proceedings which entailed far greater fact finding than was involved in the instant case. The *Lombard* court ruled that because certain due process issues had not been raised in the state proceedings, the Plaintiff was entitled to present his civil rights case in federal court.

CONCLUSION

Petitioners respectfully request that this Court grant certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit and hold that petitioners are entitled to have their case heard.

Respectfully submitted,

FRANK G. BECKER
FRANK G. BECKER & ASSOCIATES, P.C.
Counsel for Petitioner
18501 West Ten Mile Road
Southfield, Michigan 48075
313/569-4910

NOT FOR PUBLICATION

No. 95-1862

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANTONIO GREY and MARTAIN THOMPKINS, Plaintiffs-Appellants, vs. KEITH MORRIS, ED KETZLER, MARK TEMNYK, and PAT MITCHELL, Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (Filed Aug. 29, 1996)

BEFORE: CONTIE, BOGGS, and NORRIS, Circuit Judges

PER CURIAM. The district court granted the defendants' motion for summary judgment and denied the plaintiffs' motion for reconsideration. We affirm.

I.

On February 3, 1992, Wayne State University Public Safety Officers Mark Temnyk and Pat Mitchell responded to an armed robbery complaint and relayed descriptions of the alleged perpetrators to other law enforcement officers. Officers Keith Morris and Ed Ketzler subsequently observed and arrested plaintiffs-appellants Antonio Grey and Martain Thompkins because they matched the descriptions given by the complainant. The plaintiffs

were later released when the complainant changed his story.

On August 18, 1993, Grey and Thompkins filed an action in state court against Officers Temnyk, Mitchell, Morris and Ketzler (collectively the "defendants-appellees") alleging violations of Michigan's constitution and Michigan's public accommodations statutes. On June 29, 1994, Wayne County Circuit Judge MacDonald granted the officers' motion for summary disposition and dismissed the plaintiffs' complaint with prejudice. Grey and Thompkins failed to appeal this ruling.

Instead, on October 3, 1994, Grey and Thompkins filed a 42 U.S.C. § 1983 action in district court against the same four law enforcement officers arising out of the same incident. The officers sought summary judgment alleging, *inter alia*, that plaintiffs' suit was barred by res judicata. The plaintiffs failed to respond to the defendants' motion. On April 20, 1995, the district court granted the officers' motion for summary judgment:

> In *VanDeventer [v. Michigan Nat'l Bank*, 172 Mich. App. 456, 464 (1988)], the court of appeals found that "Michigan courts apply the res judicata doctrine broadly so as to bar claims that were actually litigated as well as claims arising out of the same transaction which a plaintiff could have brought, but did not."
>
> In the present case, plaintiffs' federal § 1983 action is precluded by the doctrine of res judicata or claim preclusion. First, plaintiffs' state court action was decided on the merits as it was terminated pursuant to Michigan's dispositive motion. *See Sherrell v. Bugaski*, 169 Mich. App. 10, 17 (1988) ("[a] dismissal on motion by the

> defendants, after judicial consideration, as opposed to a ministerial procedural dismissal, is an adjudication on the merits"); *Wilson v. Knight-Ridder Newspapers, Inc.*, 190 Mich. App. 277, 279 (1991) ("dismissal with prejudice . . . amounted to an adjudication of the merits and bars this action"). Judge MacDonald's order granting defendants' motion for summary disposition and dismissing plaintiffs' complaint with prejudice constitutes an adjudication on the merits.
>
> Second, "through the exercise of reasonable diligence," plaintiffs could have raised the issues before this Court with the state court. *See Department of Treasury v. Campbell*, 161 Mich. App. 526, 529 (1986) ("[s]tate courts have concurrent jurisdiction over § 1983 claims").
>
> Third, the parties in the present action are identical to those in the state action.

District Court's April 20, 1995 Opinion and Order Granting Defendants' Motion for Summary Judgment at 3-4 (citations omitted).

On April 28, 1995, Grey and Thompkins moved for reconsideration. On July 5, 1995, the district court denied the plaintiffs' motion for reconsideration:

> In bringing the present motion, plaintiffs concede that *"[t]he state court judge did not decide any issues of federal constitutional law as no claims of federal constitutional law were made in the state court."* Despite this concession, plaintiffs later allege that "the state court judge failed to even acknowledge, let alone respect, the Plaintiffs' federal constitutional rights. . . . " They contend, however, that "[i]t would turn 42 U.S.C. § 1983

> on its head to say that because of the state court's failure to protect the Plaintiffs' State Constitutional Rights, their Federal Constitutional Rights claims would – because of that failure – also be ignored." In the present case, plaintiffs' federal claims were not "ignored" because [the state court] failed to protect plaintiffs' state constitutional rights; plaintiffs' federal claims were not addressed simply because *plaintiffs* failed to bring federal claims in its original action filed in state court. . . .

District Court's July 5, 1995 Opinion and Order Denying Plaintiffs' Motion for Reconsideration at 3-4 (citations and footnotes omitted) (emphasis in original).

The plaintiffs filed their timely notice of appeal on August 4, 1995.

II.

"The doctrine of res judicata, or claim preclusion, provides that a final judgment on the merits of an action precludes the 'parties or their privies from relitigating issues that were or could have been raised' in a prior action." *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)), *cert. denied*, 116 S. Ct. 1848 (1996). "Under Michigan law, three conditions must be satisfied before res judicata will be invoked to preclude further litigation: (1) the prior action must have been decided on its merits; (2) the issues raised in the second case either were resolved in the first, or, through the exercise of reasonable diligence, might have been raised and resolved in the first case; and (3) both actions involved

the same parties or their privies." *Rowser v. Teamsters, Chauffeurs, Warehousemen & Helpers of America Local 299*, 60 F.3d 829 (6th Cir. 1995) (unpublished) (citing *Smith, Hinchman & Grylls, Assocs., Inc. v. Tassic*, 990 F.2d 256, 257-58 (6th Cir. 1993)), *cert. denied*, 116 S. Ct. 938 (1996). *See generally Clanton v. Vertalka*, 41 F.3d 1506 (6th Cir. 1994) (unpublished) ("Where a plaintiff seeks to relitigate in federal court the same claims that had earlier been decided in state court, the claims are to be given the same preclusive effect as they would be given under the law of the state in which judgment was entered."). We review a district court's decision regarding claim or issue preclusion *de novo*.[1] *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994).

Michigan courts apply a broad res judicata doctrine, similar to that applied by federal courts. *Ryker v. Abbott Laboratories*, 38 F.3d 1216 (6th Cir. 1994) (unpublished) (citing *Brookins v. General Motors Corp.*, 843 F.2d 879, 880 (6th Cir. 1987)). In Michigan, the res judicata doctrine bars "both claims actually litigated in a prior action and those claims arising out of the same transaction which

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[1] The doctrine of res judicata consists of two related concepts: claim preclusion and issue preclusion. *City of Canton v. Maynard*, 766 F.2d 236, 238 (6th Cir. 1985); *Dodrill v. Ludt*, 764 F.2d 442, 443 (6th Cir. 1985). Under the claim preclusion branch of res judicata, an earlier final judgment on the merits precludes a party from raising new issues in litigation that should have been advanced in the earlier proceeding. Under the issue preclusion branch of res judicata (traditionally termed "collateral estoppel"), a party is precluded from relitigating issues of fact or law which were necessarily decided in a previous final judgment. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984).

plaintiff could have brought, but did not."[2] *Schwartz v. City of Flint*, 187 Mich. App. 191, 194 (1991) (citing *Gose v. Monroe Auto Equip. Co.*, 409 Mich. 147, 160 (1980)), *cert. denied*, 503 U.S. 961 (1992).

The Wayne County Circuit Court dismissed the plaintiffs' first action following the defendants' motion for summary disposition. Pursuant to Michigan law, the state court's summary disposition amounted to a decision on the merits. *See, e.g., Wilson v. Knight-Ridder Newspapers, Inc.*, 190 Mich. App. 277 (1991) (the dismissal of plaintiff's defamation action for failure to post a bond constitutes an adjudication on the merits that bars plaintiffs' subsequent action); *Sherrell v. Bugaski*, 169 Mich. App. 10, 17 (1988) ("A dismissal on motion by the defendants, after judicial consideration, as opposed to a ministerial procedural dismissal, is an adjudication on the merits."). Accordingly, Grey and Thompkins' first action was decided on its merits.

Because state courts may hear constitutional claims arising under 42 U.S.C. § 1983, *see Felder v. Casey*, 487 U.S. 131, 139 (1988) (federal and state courts have concurrent jurisdiction over § 1983 actions), the district court properly determined that res judicata bars the plaintiffs from pursuing their subsequent federal action.[3] Accordingly,

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[2] The preclusive effect of a prior state court judgment is determined by the law of that state. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982).

[3] The district court also held that "[t]he absence of allegations or evidence suggesting any wrongful conduct on the part of defendants Temnyk and Mitchell also warrants the granting of their motion for summary judgment." District

we **AFFIRM** the district court's summary judgment dismissal of this action.[4]

Court's April 20, 1995 Opinion and Order Granting Defendants' Motion for Summary Judgment at 2 n.4. Because the principles of res judicata bar the plaintiffs' federal action, we need not address the district court's alternate ground for dismissal.

[4] The defendants seek sanctions against the plaintiffs and their counsel pursuant to Federal Rule of Appellate Procedure 38 which provides: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." We deny the defendants' motion for sanctions pursuant to Fed. R. App. P. 38.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTONIO GREY and MARTAIN THOMPKINS,
Plaintiffs,

vs.

KEITH MORRIS, ED KETZLER, MARK TEMNYK and PAT MITCHELL,
Defendants.
_____/

CASE NO.:94-CV-73984-DT
HON. PATRICK J. DUGGAN

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on Jul. 5, 1995

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT JUDGE

I. Background

On August 18, 1993, plaintiffs filed a two-count complaint in Wayne County Circuit Court ("WCCC") against defendants for violating their rights under Michigan's Constitution and Public Accommodations Statutes. On June 29, 1994, WCCC Judge Kathleen MacDonald granted defendants' motion for summary disposition and dismissed plaintiffs' complaint with prejudice in its entirety. On October 3, 1994, plaintiffs filed an action against the same defendants in this Court under 42 U.S.C. § 1983 alleging violations of their First, Fourth and Fourteenth Amendment federal rights. On April 20, 1995, this Court

granted defendants' motion for summary judgment on res judicata claim preclusion grounds.[1]

On April 28, 1995, plaintiffs filed the present motion for reconsideration of this Court's April 20 Opinion and Order based on the following grounds:

> 1) the doctrine of res judicata is inapplicable . . . since the plaitniffs orignally filed an action **exclusively** under Michigan constitutional grounds.
>
> 2) the state court action was dismissed pursuant to a Motion for Summary Disposition under Michigan law. There was no determination on the merits, as required for the doctrine of res judicata to apply.
>
> 3) the Plaintiffs were seeking redress of their federally protected constitutional rights in federal court after denial of enforcement in state court.
>
> 4) the doctrine of res judicata, under Michigan law, is only relevant after full hearing **on the merits** as to the same issues.
>
> 5) all parties who participated in the wrong to the Plaintiffs are liable under the theory of joint and several liability.[2]

---

[1] This Court also granted summary judgment to defendants Temnyk and Mitchell based on plaintiffs' failure to allege any evidence of these defendants' wrongful conduct. *See* Op. & Order at 2 n.4.

[2] In making this argument, plaintiffs appear to be taking issue with the Court's disposition as to defendants Temnyk and Mitchell. *See* n.1, *supra*. In plaintiffs' present motion, they did not provide this Court with any additional facts in support of

Pls.' Mot. for Recons. ¶¶ 1-5 (emphasis in original). On May 10, defendants filed their response to plaintiffs' motion, at the conclusion of which they request that this Court, in addition to denying plaintiffs' motion, order plaintiffs' counsel to show cause why he has not violated Fed.R.Civ.P. 11. (Defs.' Resp. Br. at 9).[3]

II. Standard of Review

To receive relief on a motion for reconsideration, plaintiffs "shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof." Local Rule ("LR") 7.1(h)(3).

III. Discussion

In bringing the present motion, plaintiffs concede that *"[t]he state court judge did not decide any issues of federal constitutional law as no claims of federal constitutional law were made in the state court."* (Pls.' Br. in Supp. of Mot. for Recons. at 1) (emphasis added). Despite this concession, plaintiffs later allege that "the state court judge failed to even acknowledge, let alone respect, the Plaintiffs' federal constitutional rights. . . . " *Id.* at 4.[4] They contend, however, that:

---

their claim against these defendants. Therefore, plaintiffs' challenge to this Court's order on this basis is without merit.

[3] Under Fed.R.Civ.P. 11(c)(1)(A), a motion for sanctions "shall be made separately from other . . . requests. . . . " Therefore, defendants' present request is denied.

[4] After a thorough review of the hearing transcript on defendants' motion for summary disposition before WCCC

> [i]t would turn 42 USC § 1983 on its head to say that because of the state court's failure to protect the Plaintiffs' State Constitutional Rights, their Federal Constitutional Rights claims would – because of that failure – also be ignored.

Id. at 3. In the present case, plaintiffs' federal claims were not "ignored" because WCCC Judge MacDonald failed to protect plaintiffs' state constitutional rights; plaintiffs' federal claims were not addressed simply because *plaintiffs* failed to bring federal claims in its original action filed in state court.[5] And despite plaintiffs' reference to various cases and unsupported propositions of law, plaintiffs have failed to identify any "palpable defect" by which the Court was misled. However, this Court will briefly address two of plaintiffs' arguments.

First, plaintiffs allege that "[i]n determining whether a federal civil rights claim is barred, because of a state ruling on state claims, one must logically look to federal law, not state law." *Id.* at 4. In *Smith, Hinchman & Grylls, Assoc., Inc. v. Tassic*, 990 F.2d 256 (6th Cir. 1993), the Court held:

> the res judicata effect of state court judgments . . . requires the federal court to look to *state court law* of res judicata. "It is now well

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Judge MacDonald on June 15, 1994, *see* Pls.' Resp. Br., Ex. A, this Court finds that federal constitutional claims were not before that court.

[5] As indicated in the original opinion, since these claims could have, and should have been brought in the state court action, plaintiffs are now barred by the doctrine of res judicata. *See VanDeventer v. Michigan, Nat'l Bank*, 172 Mich. App. 456, 464 (1988), *appeal denied* (Mich. May 31, 1989).

> settled that a Federal Court must give to a State Court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered."

Id. at 257 (citing *Migra v. Warren City School Dist.*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984) (emphasis added), *See Brookins v. General Motors Corp.*, 843 F.2d 879, 880 (6th Cir. 1987).

Second, plaintiffs contend that Michigan "does not apply the doctrine of res judicata when there is a question of changed law. In this case, the Civil Rights cause of action definitely involved a change of law as a different Constitution (US versus State) was involved." (Pls.' Br. at 6). Plaintiffs have not alleged any "changed" law. They have simply pointed out the existence of two different sets of law, state and federal.

For these reasons and those stated more fully in this Court's April 20, 1995 Opinion and Order,

IT IS ORDERED that plaintiffs' motion for reconsideration is **DENIED**. *See* LR 7.1(h)(3).

/s/ PATRICK J. DUGGAN
PATRICK J. DUGGAN
UNITED STATES
DISTRICT JUDGE

Pursuant to Fed.R.Civ.P. 77(d),
copies mailed this date to the
following parties:

Frank G. Becker, esq.
Daniel J. Bernard, esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTONIO GREY and MARTAIN THOMPKINS,
Plaintiffs,

vs.

KEITH MORRIS, ED KETZLER, MARK TEMNYK and PAT MITCHELL,
Defendants.
_____/

CASE NO.:94-73984-DT
HON. PATRICK J. DUGGAN

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on Apr. 20, 1995

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

Background

On February 3, 1992, plaintiffs were arrested for armed robbery by defendants Morris and Ketzler[1] and subsequently transported to the 13th Precinct of the

[1] Defendants Morris and Kelzler arrested plaintiffs based on information relayed to a dispatcher by defendants Temnyk and Mitchell pursuant to an armed robbery complaint.

Detroit Police Department, where plaintiffs were later released based on the complainant's changed story.[2]

Based on these events, on August 18, 1993, plaintiffs filed a two-count complaint against the above-named defendants in Wayne County Circuit Court. In Count I, plaintiffs alleged that defendants violated their right to due process, to a fair investigation and to be free from unreasonable seizures as protected by Michigan's Constitution. (Defs.' Br. in Supp. of Mot. for Summ. J., Ex. E., Pls.' State Compl. at 3). In Count II, plaintiffs alleged that defendants violated Michigan Public Accommodations Statutes. *Id.* at 4. On June 29, 1994, Wayne County Circuit Judge Kathleen MacDonald issued an order granting defendants' motion for summary disposition and dismissed plaintiffs' complaint with prejudice in its entirety. *See* Defs.' Ex. F.

On October 3, 1994, plaintiffs filed the present action in this Court against the same defendants they sued in Wayne County Circuit Court under 42 U.S.C. § 1983 alleging violations of their First, Fourth and Fourteenth federal constitutional rights.[3] Currently before this Court is defendants' motion for summary judgment (filed Mar. 22, 1995) based on res judicata and defendants Temnyk and Mitchell's lack of personal involvement. Plaintiffs did not file a response to defendants' motion.

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[2] Plaintiff Thompkins was held at the Department on an outstanding warrant.

[3] In their complaint, plaintiffs allege that their "rights were not protected by state court nor under state law in this civil rights action and federal court is necessary." (Pls.' compl. ¶ 3).

For the reasons discussed below, defendants' motion is granted based on the doctrine of res judicata or claim preclusion.[4]

Discussion

In *Smith, Hinchman and Grylls, Assocs., Inc. v. Tassic*, 990 F.2d 256 (6th Cir. 1993), the Court found that:

> [f]irst, the res judicata effect of state court judgments in federal court is governed by 28 U.S.C. § 1738 which requires the federal court to look to state court law of res judicata. "It is now well settled that a Federal Court must give to a State Court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." Therefore we look to Michigan law to decide the effect of the state proceeding.

Under Michigan Law, the doctrine of res judicata precludes collateral attack, if:

(1) The prior action was decided on its merits;

(2) The issues raised in the second case either were resolved in the first, or through the exercise of reasonable diligence might have been raised and resolved in the first case; and

(3) both actions involved the same parties or their privies.

---

[4] The absence of allegations or evidence suggesting any wrongful conduct on the part of defendants Temnyk and Mitchell also warrants the granting of their motion for summary judgment.

Id. at 257-58 (internal citation omitted). *See Brookins v. General Motors Corp.*, 843 F.2d 879, 880 (6th Cir. 1987); *VanDeventer v. Michigan Nat'l Bank*, 172 Mich. App. 456, 464 (1988), *appeal denied* (May 31, 1989). In *VanDeventer*, the court of appeals found that "Michigan courts apply the res judicata doctrine broadly so as to bar claims that were actually litigated as well as claims arising out of the same transaction which a plaintiff could have brought, but did not." *Id. See also Coe v. Michigan Dep't of Educ.*, 693 F.2d 616, 618 (6th Cir. 1982); *Warda v. Commissioner of Internal Revenue*, 15 F.3d 533, 537 (6th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 55, 130 L.Ed.2d 14 (1994).

In the present case, plaintiffs' federal § 1983 action is precluded by the doctrine of res judicata or claim preclusion. First, plaintiffs' state court action was decided on the merits as it was terminated pursuant to Michigan's dispositive motion. *See Sherrell v. Bugaski*, 169 Mich. App. 10, 17 (1988) ("[a] dismissal on motion by the defendants, after judicial consideration, as opposed to a ministerial procedural dismissal, is an adjudication on the merits"); *Wilson v. Knight-Ridder Newspapers, Inc.*, 190 Mich. App. 277, 279 (1991) ("dismissal with prejudice . . . amounted to an adjudication of the merits and bars this action"). Judge MacDonald's order granting defendants' motion for summary disposition and dismissing plaintiffs' complaint with prejudice constitutes an adjudication on the merits.

Second, "through the exercise of reasonable diligence," plaintiffs could have raised the issues before this Court with the state court. *See Department of Treasury v. Campbell*, 161 Mich. App. 526, 529 (1986) ("[s]tate courts have concurrent jurisdiction over § 1983 claims"). *See also*

Aben v. Dallwig, 665 F.Supp. 523, 524, 525 (E.D. Mich. 1987).

Third, the parties in the present action are identical to those in the state action.

Accordingly,

IT IS ORDERED that defendants' motion for summary judgment is **GRANTED**.

IT IS FURTHER ORDERED that plaintiffs' complaint is **DISMISSED WITH PREJUDICE** in its entirety.

/s/ PATRICK J. DUGGAN
PATRICK J. DUGGAN
UNITED STATES
DISTRICT JUDGE

Pursuant to Rule 77(d), Fed.R.Civ.P. 77(d),
copies mailed this date to the
following parties:

Frank G. Becker, Esq.
Daniel J. Bernard, Esq., Louis Lessem, Esq.,
Pamela R. Galloway, Esq., Miriam Martin-Clark, Esq.

(2)

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FILED
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CLERK

No. 96-866

In The

Supreme Court of the United States

October Term, 1996

ANTONIO GREY, MARTAIN THOMPKINS,

Petitioners,

vs.

KEITH MORRIS, ED KETZLER, MARK TEMNYK, and PAT MITCHELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DANIEL J. BERNARD
Counsel for Respondents
Wayne State University
Office of the General Counsel
4249 F.A.B., 656 W. Kirby
Detroit, Michigan 48202
(313) 577-2268

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 2

I. STANDARD OF REVIEW 2

II. PETITIONERS' CLAIMS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA* 3

A. ELEMENTS OF *RES JUDICATA* 3

B. THE DOCTRINE OF *RES JUDICATA* WAS PROPERLY APPLIED TO BAR PETITIONERS' FEDERAL ACTION 4

1. THE STATE COURT ACTION WAS DECIDED ON ITS MERITS 4

2. THE ISSUES IN THE FEDERAL CASE COULD HAVE BEEN RAISED AND RESOLVED IN THE STATE CASE ... 4

3. PETITIONERS' STATE AND FEDERAL ACTIONS INVOLVE THE SAME PARTIES 5

III. PETITIONERS' CLAIMS AGAINST RESPONDENTS TEMNYK AND MITCHELL WERE PROPERLY DISMISSED 5

IV. PETITIONERS HAVE COMPLETELY MISREPRESENTED THE ISSUES BEFORE THIS COURT 6

A. PETITIONERS HAVE MISREPRESENTED THE BASIS OF THE STATE COURT DECISION 6

TABLE OF CONTENTS – Continued

Page

B. PETITIONERS HAVE MISREPRESENTED THE NATURE OF THEIR CLAIMS BEFORE THE STATE COURT..... 9

C. PETITIONERS HAVE MISREPRESENTED THE CASES CITED IN THEIR BRIEF ... 11

CONCLUSION AND RELIEF REQUESTED..... 16

TABLE OF AUTHORITIES

Page

CASES

Aben v. Dallwig, 665 F.Supp. 523 (E.D. Mich. 1987) 5

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) 3, 5

Berkaw v. Mayflower Congregational Church, 378 Mich. 239 (1966) 13

Bissell v. Spring Valley Township, 124 U.S. 225, 31 L.Ed. 411, 8 S.Ct. 495 (1888) 13

Bresnahan v. Nugent, 92 Mich. 76 (1892) 12, 13

City of Mt. Clemens v. United States Environmental Protection Agency, 917 F.2d 908 (6th Cir. 1990) 2

Department of Treasury v. Campbell, 161 Mich. App. 526 (1986) 5

Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991) 9, 15

Duncan v. Peck, 752 F.2d 1135 (6th Cir. 1985) 16

Fellowship of Christ Church v. Thorburn, 758 F.2d 1140 (6th Cir. 1985) 4

Gose v. Monroe Auto Equipment Company, 409 Mich. 147 (1980) 4

Haring v. Prosise, 462 U.S. 306, 103 S.Ct. 2368, 76 L.Ed.2d 494 (1983) 15

Harsco Corp. v. Zlotnicki, 779 F.2d 906 (3rd Cir. 1985) 3

Katt v. Dykhouse, 983 F.2d 690 (6th Cir. 1992) 4

Laude v. Cossins, 334 Mich. 622 (1952) 13

TABLE OF AUTHORITIES – Continued

Page

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) 3

Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) 3

Oakley v. Michigan Department of Mental Health, 122 Mich. App. 638 (1983) 14

Palchi v. Robbins, 272 Mich. 411 (1935) 12, 13

Quick v. General Motors Corporation, Saginaw Steering Gear Division, 686 F.Supp. 1224 (E.D. Mich. 1988) 3

Roberts v. City of Troy, 170 Mich. App. 567 (1988) 12

Rodman v. Michigan Central Railroad Company, 59 Mich. 395 (1886) 12

San Joaquin County v. Dewey, 105 Mich. 122 (1981) 14

Sherrell v. Bugaski, 169 Mich. App. 10 (1988) 4

Slater v. KFC Corp., 621 F.2d 932 (8th Cir. 1980) 3

Socialist Workers Party v. Secretary of State, 412 Mich. 571 (1982) 4

Taylor v. Auditor General, 360 Mich. 146 (1960) 13

U.S. v. McGlocklin, 8 F.3d 1037 (6th Cir. 1993) 3

Wade v. City of Pittsburgh, 765 F.2d 405 (3rd Cir. 1985) 11

Wessborg v. Merrill, 195 Mich. 556 (1917) 14

Wilson v. Knight-Ridder Newspapers, Inc., 190 Mich. App. 277 (1991) 4

Xerox Corporation v. Kalamazoo, 76 Mich. App. 150 (1977) 14

STATEMENT OF THE CASE

This matter comes before the Court on Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, following that court's *per curiam* decision affirming the District Court's orders granting Respondents' motion for summary judgment and denying Petitioners' motion for reconsideration.

On February 3, 1992, Wayne State University public safety officers Mark Temnyk and Pat Mitchell responded to a possible armed robbery complaint. They reported descriptions of the alleged perpetrators, which descriptions were then relayed to other police officers. Officers Keith Morris and Ed Ketzler then observed the Petitioners, who matched precisely the descriptions given by the complainant. The Petitioners were then arrested and transported to a City of Detroit police precinct. The Petitioners were later released after the complainant changed his story.

The Petitioners filed a complaint against all four police officers in the Wayne County Circuit Court on August 18, 1993. The state court complaint alleged various violations of Michigan's constitution as well as Michigan's public accommodations statutes. On June 29, 1994, Wayne County Circuit Judge Kathleen MacDonald issued an order granting Respondents' motion for summary disposition and dismissing Petitioners' complaint with prejudice in its entirety. Petitioners did not appeal this ruling.

On October 3, 1994, Petitioners filed an action in the United States District Court for the Eastern District of Michigan, against the same Respondents, arising out of

the same incident. Petitioners sued under 42 U.S.C. § 1983, alleging violations of their First, Fourth, and Fourteenth Amendment rights.

Respondents filed a motion for summary judgment based on (1) *res judicata* and (2) the absence of any allegations against Respondents Temnyk and Mitchell. Petitioners did not file a response to the motion for summary judgment.

On April 20, 1995, Judge Patrick J. Duggan of the United States District Court issued his opinion and order granting Respondents' motion for summary judgment. Petitioners filed a motion for reconsideration on April 28, 1995. The Court permitted Respondents to file a response to this motion, which Respondents did on May 10. On July 5, 1995, Judge Duggan issued his opinion and order denying Petitioners' motion for reconsideration.

From the orders granting Respondents' motion for summary judgment and denying Petitioners' motion for reconsideration, Petitioners appealed of right to the United States Court of Appeals for the Sixth Circuit. On August 29, 1996, the Sixth Circuit issued an unpublished *per curiam* opinion affirming the decisions of the District Court.

ARGUMENT

I. STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *City of Mt. Clemens v. United States Environmental Protection Agency*, 917 F.2d 908, 914 (6th Cir. 1990). The court

must examine the record, taken as a whole, to determine whether the non-moving party has raised a genuine issue of material fact. *Id.* at 913-914. See also *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986).

The standard of review of the district court's denial of Plaintiffs' motion for reconsideration is limited to determining whether the trial court abused its discretion. See e.g., *Harsco Corp. v. Zlotnicki*, 779 F.2d 906 (3rd Cir. 1985); *Slater v. KFC Corp.*, 621 F.2d 932 (8th Cir. 1980).

II. PETITIONERS' CLAIMS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA*.

A. Elements of *Res Judicata*.

A federal court must give the same preclusive effect to a state court judgment as given that judgment under the law of the state where the judgment was rendered. *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *U.S. v. McGlocklin*, 8 F.3d 1037, 1052-1053 (6th Cir. 1993); *Quick v. General Motors Corporation, Saginaw Steering Gear Division*, 686 F. Supp. 1224, 1228 (E.D. Mich. 1988).

Under Michigan law, there are three prerequisites to the application of the doctrine of *res judicata*: (1) the prior action must have been decided on its merits; (2) the issues raised in the second case either were resolved in the first, or through the exercise of reasonable diligence might have been raised and resolved in the first case; and (3) both actions involve the same parties or their privies.

Fellowship of Christ Church v. Thorburn, 758 F.2d 1140, 1144-1145 (6th Cir. 1985); *Socialist Workers Party v. Secretary of State*, 412 Mich. 571 (1982).

Michigan courts follow a broad application of *res judicata* to bar not only claims identical to those already litigated, but also claims arising out of the same transaction which plaintiff could have brought, but did not. *Katt v. Dykhouse*, 983 F.2d 690, 693 (6th Cir. 1992); *Gose v. Monroe Auto Equipment Company*, 409 Mich. 147 (1980).

B. The Doctrine of *Res Judicata* Was Properly Applied To Bar Petitioners' Fedaral Action.

1. The State Court Action Was Decided On Its Merits.

The Petitioners' state court action was dismissed by an order granting Respondents' motion for summary disposition. Accordingly, the state court lawsuit was decided on its merits. See e.g., *Sherrell v. Bugaski*, 169 Mich. App. 10, 17 (1988) ("[a] dismissal on motion by the defendants, after judicial consideration, as opposed to a ministerial procedural dismissal, is an adjudication on the merits"); *Wilson v. Knight-Ridder Newspapers, Inc.*, 190 Mich. App. 277, 279 (1991) ("dismissal with prejudice . . . amounted to an adjudication of the merits and bars this action").

2. The Issues In The Federal Case Could Have Been Raised And Resolved In The State Case.

Although the incident about which Petitioners complain occurred on or about February 3, 1992, Petitioners

did not file their state court action until August 18, 1993. There is no evidence to suggest – and no suggestion by Petitioners – that anything prevented them from raising their federal claims in the state court action.

State courts have concurrent jurisdiction to hear constitutional claims arising under 42 U.S.C. § 1983. See *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Aben v. Dallwig*, 665 F. Supp. 523, 524, 525 (E.D. Mich. 1987); *Department of Treasury v. Campbell*, 161 Mich. App. 526, 529 (1986).

3. Petitioners' State And Federal Actions Involve The Same Parties.

This element is self evident and not disputed by Petitioners.

III. PETITIONERS' CLAIMS AGAINST RESPONDENTS TEMNYK AND MITCHELL WERE PROPERLY DISMISSED.

Respondents moved for summary judgment as to the claims against Respondents Temnyk and Mitchell on the grounds that Petitioners had not alleged any wrongful conduct on the part of Temnyk and Mitchell. The District Court granted the motion, in part, on these grounds (Opinion and Order Granting Defendants' Motion for Summary Judgment, p. 2, n. 4). Petitioners did not contest the dismissal of Officers Temnyk and Mitchell in their motion for reconsideration, they did not address the dismissal on appeal, and they have not addressed it in their petition to this Court. Accordingly, Petitioners have

waived any challenge to this portion of the District Court's order.

IV. PETITIONERS HAVE COMPLETELY MISREPRESENTED THE ISSUES BEFORE THIS COURT.

A. Petitioners Have Misrepresented The Basis Of The State Court Decision.

Petitioners' state court complaint had two counts. The first was for various violations of the Michigan Constitution. With regard to that count, the state court ruled as follows:

> Probable cause existed for the arrest of the Plaintiffs in this case. The existence of probable cause negates any claim the Plaintiff would have for false arrest and imprisonment, failure to make an adequate inquiry or investigate prior to arrest, any illegal search and seizure and any violation of due process, or any other civil rights that the Plaintiff could claim. Therefore, the motion . . . is granted.

Transcript of State Court Proceedings, p. 25.

With regard to the second count, alleging violation of the Michigan Public Accommodations statute, the state court ruled as follows:

> Plaintiff, at most here, can allege they were denied the public streets in their school. I don't think that this statute was ever meant to be extended to the point where this – where the Plaintiff argued this morning. And these Defendants did not act in violation of this statute.

> They acted under their authority and their mandate.
>
> Transcript of State Court Proceedings, p. 26.

The foregoing rulings completely disposed of Petitioners' claims. In addition to these rulings, the state court added a ruling on the defense of governmental immunity:

> As far as the governmental immunity claim, I think all of these officers are immune. The concert of action claim is also dismissed. I think there are no genuine issues of material fact in this case. Motion is granted.
>
> Transcript of State Court Proceedings, p. 26.

Despite the state court's care in rendering its opinion and the clarity of its rulings, Petitioners persist in attempting to characterize the state court judgment as one based solely on governmental immunity. To this end, Petitioners state the "Question Presented for Review" as follows:

> "Whether *State Immunity Law* Can Bar This 42 U.S.C. Sec. 1983 Action?"
>
> Petition for Writ of Certiorari, p. i (emphasis added).

This obvious misstatement of the case is not inadvertant, since Petitioners posed the issue to the Sixth Circuit as follows:

> "Did the Federal District Court err in dismissing the Plaintiff-Appellants' 42 U.S.C. Sec. 1983 action based on a prior State Court dismissal of the Plaintiffs-Appellants' previous state law action *which was dismissed pursuant to state governmental immunity?"*

Appellants' Brief to the Sixth Circuit, p. 2 (emphasis added).

Although Petitioners acknowledge the state court ruling that probable cause for the arrests of the Petitioners existed (Petition for Writ of Certiorari (hereafter Petition) at 2), Petitioners later continue to misrepresent the basis of the state court's decision and the subsequent decision of the Federal District Court. On page four of their Petition, the Petitioners state:

> In essence, the lower courts have ruled that the state judge, *through application of state governmental immunity,* could permanently deprive the Plaintiffs of the opportunity to bring the federal constitutional claims in federal court. Consequently, the lower court has taken the position that *state governmental immunity law* supersedes not only federal law but the federal Constitution. (Emphasis added).

Petitioners' state court action was not dismissed solely or even primarily on the grounds of immunity. The trial court specifically (1) found that probable cause existed for the Petitioners' arrest, thus requiring the dismissal of Petitioners' constitutional claims; and (2) rejected the allegation that Respondents had violated Michigan's Public Accommodations statute. The Petition does not simply ignore these rulings, but instead casts the state court decision in an entirely false light.

B. Petitioners Have Misrepresented The Nature Of Their Claims Before The State Court.

At several points in their Petition, Petitioners allege that the state court did not address Petitioners' excessive force claim. Petition at 3, 5-6, 7. However, in an attempt to force this case into a posture in which *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991), might be applicable, the Petitioners conceded that they did not bring an excessive force claim before the state court. At pages 15-16 of their brief to the Sixth Circuit, the Petitioners stated:

> "In the instant, *the Plaintiffs' excessive force claims were only brought in the federal court action.* The state court action concerned the question of unreasonable search." (Emphasis added).

A review of Petitioners' state court complaint reveals no allegation of excessive force. This contrasts with the federal court action, in which there is an express allegation of excessive force.

It is further instructive that, in describing the nature of Petitioners' state court complaint, the U.S. District Court did not observe any allegation of excessive force. Opinion and Order Granting Defendants' Motion for Summary Judgment at 1-2.

The Petitioners further mischaracterize the nature of the claims before the state court on pages 13-14 of the Petition:

> In this case, the Plaintiffs' federally protected constitutional rights were not protected in state court through Plaintiffs' reliance on state law . . . This action was brought because the state court disregarded the rights of the Plaintiffs to

> be free from an unlawful arrest and excessive force. It would turn 42 U.S.C. Sec. 1983 on its head to say that because of the state court's failure to enforce the Plaintiffs' State Constitutional Rights, their Federal Constitutional Rights claims would – because of that failure – be barred. How could Plaintiffs foresee such hostile State Court and later Federal Court reception?
>
> In this case, the state court judge did not acknowledge, let alone respect, the Plaintiffs' Federal Constitutional Rights or those similar rights purportedly protected under the State Constitution.

The foregoing is almost a verbatim reiteration of a position taken in Petitioners' brief in support of motion for reconsideration in the District Court. The District Court judge dealt with these allegations by pointing out:

> In the present case, Plaintiffs' federal claims were not "ignored" because WCCC Judge McDonald failed to protect Plaintiffs' State Constitutional Rights; Plaintiffs' federal claims were not addressed simply because *Plaintiffs* failed to bring federal claims in its [sic] original action filed in State Court.
>
> Opinion and Order Denying Plaintiffs' Motion for Reconsideration, pp. 3-4 (footnote omitted; emphasis in original).

Petitioners have not attempted to reconcile their allegations with the District Court's observations, nor have they indicated why a state court judge would expound on federal law when Petitioners had chosen not to present

any federal claims. To suggest that the state court "disregarded" or "did not acknowledge, let alone respect" Petitioners' federal rights is to mischaracterize proceedings before the state court and to present a distorted picture to this Court.

C. Petitioners Have Misrepresented The Cases Cited In Their Petition.

After reviewing the cases cited in the Petition and the propositions for which they were cited, it is difficult to know where to begin to describe the extent of the misrepresentation. For want of a better system, the cases will be addressed as they appear in the Petition.

Wade v. City of Pittsburgh, 765 F.2d 405 (3rd Cir. 1985). Petitioners describe *Wade* as "the decision which most closely approximates the instant situation." Petition at 4. Petitioners cite *Wade* for the proposition that a state court judgment based on statutory immunity does not bar a subsequent federal civil rights lawsuit. *Id.* However, the use of *Wade* incorrectly assumes that the state court judgment in the present action was based upon governmental immunity. Moreover, the Third Circuit specifically observed in *Wade* that the application of *res judicata* in Pennsylvania requires a determination on the merits, 765 F.2d at 408, and a judgment based on statutory immunity was not a decision on the merits. 765 F.2d at 410-411. In the present action, the state court clearly ruled upon the merits of the claims presented, and the Petitioners have not addressed the District Court's ruling in that regard. Opinion and Order Granting Defendants' Motion for Summary Judgment at 3-4.

Roberts v. City of Troy, 170 Mich. App. 567 (1988). Petitioners describe *Roberts* as "the case most clearly on point," demonstrating that the doctrine of *res judicata* does not bar Petitioners' federal action. Petitioners describe *Roberts* as involving "a federal court action which was clearly on the merits." However, Petitioners omit from their description of *Roberts* the fact that the state law claims which were the subject of the state court action had been dismissed by the federal court without prejudice. 170 Mich. App. at 573. The court further observed that a dismissal without prejudice is not an adjudication on the merits and will not bar a subsequent state court action. *Id.* at 577-578. In the present case, the state court action was decided on the merits and the dismissal was with prejudice. *Roberts* is inapplicable.

Rodman v. Michigan Central Railroad Company, 59 Mich. 395 (1886) (mis-cited by Plaintiffs as 49 Mich. 395). Petitioners describe *Rodman* as presenting the "same issue" as the present case. Apparently, this conclusion derives from Petitioners' misapprehension as to the meaning of a general demurrer. Of course, a general demurrer of the sort raised in *Rodman* is a procedural ruling and not a ruling on the merits of the dispute. 59 Mich. at 398-399. See also *Palchi v. Robbins*, 272 Mich. 411, 419 (1935).

Bresnahan v. Nugent, 92 Mich. 76 (1892). Petitioners describe *Bresnahan* as a "similar situation" to the present case and lift the quotation:

> An ineffectual attempt to enforce a claim which has no legal existence does not estop a party from thereafter asserting one which is valid.

Petition at 9.

What Petitioners fail to point out to the Court is that the action which the Michigan Supreme Court held was not entitled to estoppel was a lawsuit which had been dismissed without prejudice. 92 Mich. at 83-84.

Palchi v. Robbins, 272 Mich. 411 (1935). It is not clear for what purpose Plaintiffs cite *Palchi,* other than the fact that the *Palchi* court rejected a claim of *res judicata. Palchi* required the Michigan Supreme Court to determine the preclusive effect of the dismissals of two lawsuits previously filed in the California state and federal courts. In each case, general demurrers were granted, but it was not clear whether the demurrers went to the merits of the cases. The court noted "that where a demurrer goes to both defects of form and also to the merits, a judgment thereon, not designating between the two grounds, will be presumed to rest on the former." 272 Mich. at 419, quoting *Bissell v. Spring Valley Township,* 124 U.S. 225, 232; 31 L. Ed. 411; 8 S.Ct. 495 (1888). Therefore, the Michigan court reasoned that the prior demurrers did not go to the merits of the prior cases, and the California dismissals did not preclude the Michigan lawsuit.

Petitioners next cite a series of cases, without discussion, claiming that these cases support their contention that a determination on the merits was not made by the state court. These cases do not apply here. They are *Berkaw v. Mayflower Congregational Church,* 378 Mich. 239 (1966) (declining to apply the doctrine of collateral estoppel where two prior New York class actions had not decided the issue presented in the Michigan case); *Taylor v. Auditor General,* 360 Mich. 146 (1960) (Michigan Supreme Court expressly declines to consider the theory of *res judicata*); *Laude v. Cossins,* 334 Mich. 622 (1952)

(dismissal of a prior action by a court without jurisdiction to hear the case is not a bar to a subsequent lawsuit in a court of proper jurisdiction); *Wessborg v. Merrill*, 195 Mich. 556 (1917) (no discussion of *res judicata*); *Xerox Corporation v. Kalamazoo*, 76 Mich. App. 150 (1977) (Tax Tribunal not barred from hearing plaintiff's claims because prior decisions did not involve any determination on the merits).

Oakley v. Michigan Department of Mental Health, 122 Mich. App. 638 (1983) and *San Joaquin County v. Dewey*, 105 Mich. 122 (1981). It is not clear why Petitioners cite these cases. The *San Joaquin County* and *Oakley* cases do not address summary disposition on the merits, since they considered only the *res judicata* effect of accelerated judgment under the old Michigan General Court Rules of 1963[1], not summary disposition under the applicable current rule, MCR 2.116(C)(10).[2]

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[1] GCR 1963, 116 provided in part as follows: "I. Grounds. In a party's first responsive pleading, or by motion filed not later than his first responsive pleading, a party may demand that service of process be quashed or that judgment be entered dismissing 1 or more claims asserted against him upon any of the following grounds: (1) the court lacks jurisdiction of the person or property, (2) the court lacks jurisdiction of the matter, (3) the party asserting the claim lacks legal capacity to sue, (4) another action is pending between the same parties involving the same claim, (5) the claim is barred because of release, payment, prior judgment, statute of limitations, statute of frauds, infancy, or other disability of the moving party, or assignment or other disposition of the claim before commercial of the action."

[2] MCR 2.116(C)(10) provides that summary disposition shall be ordered where, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving

Haring v. Prosise, 462 U.S. 306, 103 S.Ct. 2368, 76 L. Ed. 2d 494 (1983). Petitioners cite *Haring v. Prosise*, for the proposition that an issue not decided in a prior criminal trial could be raised by a §1983 plaintiff. Petitioners contend that *Haring* is "on all fours" with the present case since Petitioners' federal constitutional rights were not litigated in the state court. Petition at 15-16. What Petitioners fail to tell the Court is that *Haring* was decided by construing Virginia law, which provides – much more narrowly than Michigan law – that a judgment in a prior action operates as an estoppel only as to those matters actually in issue and upon which the finding or verdict was rendered. 462 U.S. at 314-315, 76 L. Ed. 2d at 604-605. By contrast, Michigan law bars the relitigation of issues which either were resolved in a prior action or through the exercise of reasonable diligence might have been raised and resolved in a prior action.

Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991). Petitioners represent the case of *Dixon v. Richer*, as "even closer to the instant situation" than *Haring*. Petition at 16. However, Petitioners do not disclose to this Court that *Dixon* depended upon an interpretation of Colorado law, which precludes litigation of an issue if the issue is "actually litigated and necessarily adjudicated" in a prior proceeding. 922 F.2d at 1459. In this regard, Colorado law is narrower than Michigan law and *Dixon* is therefore inapplicable.

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party is entitled to judgment or partial judgment as a matter of law."

Duncan v. Peck, 752 F.2d 1135 (6th Cir. 1985). Although Petitioners allege that "*Duncan* has direct application to the facts and circumstances of this case," Petitioners neglect to advise this Court that *Duncan* applied Ohio law which is narrower than Michigan law on the breadth of *res judicata*.

CONCLUSION AND RELIEF REQUESTED

This case presents a simple and straightforward issue – under Michigan law, did the dismissal of Petitioners' lawsuit on the merits bar a subsequent lawsuit arising out of the same transaction and occurrence? In their petition to this Court, Petitioners do not address any of the cases cited by Respondents in their motion for summary judgment in the trial court, any of the cases cited by the trial court in its opinions, or any of the cases or reasoning of the Court of Appeals. Instead as they did in the lower courts, Petitioners attempt to rely upon a misrepresentation of the issues decided by the state court, a misrepresentation of the issues presented to the state court, and a misrepresetation of the cases cited in their petition.

Petitioners do not so much as mention the alternative grounds for dismissal of the complaint as to Respondents Temnyk and Mitchell, namely that there has been no allegation of any wrongdoing.

For the foregoing reasons, Respondents pray that this Honorable Court will deny the petition for writ of certiorari.

Respectuflly submitted,

DANIEL J. BERNARD
Counsel for Respondents
Wayne State University
Office of the General Counsel
656 W. Kirby, 4249 F.A.B.
Detroit, MI 48202
(313) 577-2268